

SI PREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1949

No. 11

TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian, PETITIONER,

vs.

MANUFACTURERS TRUST COMPANY.

No. 15

MANUFACTURERS TRUST COMPANY, PETITIONER,

vs.

TOM C. CLARK, Attorney General, as Successor to the
Alien Property Custodian.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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1 In United States Circuit Court of Appeals
 For the Second Circuit

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES
AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,
PETITIONER-APPELLEE,

against

MANUFACTURERS TRUST COMPANY,
RESPONDENT-APPELLANT.

Statement Under Rule 15(b)

This is an appeal from an order of the United States District Court for the Southern District of New York made pursuant to Section 17 of the Trading with the Enemy Act, as amended (40 Stat. 425, 50 U. S. C. App. Sec. 17). Respondent, Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian, instituted the proceeding by the service upon Manufacturers Trust Company, the appellant, on October 31, 1947, of a petition and order to show cause dated October 29, 1947 requiring appellant to show cause why an order should not be made directing appellant to comply with Vesting Order No. 5791 of the Alien Property Custodian and the demands based thereon.

The motion came on to be heard before Judge Alfred C. Coxe on November 7, 1947 and was then adjourned to and came on to be heard on November 13, 1947. Appellant's answer to petition was filed on November 13, 1947. On December 12, 1947 an order was made and entered directing appellant to pay to respondent the sum of \$26,963.29. On the 30th day of December, 1947 an appeal was taken by the filing with the Clerk of the United States District Court for the Southern District of New York of a notice of appeal dated December 29, 1947 as well as of a bond for costs.

2 There has been no change in the parties; Manufacturers Trust Company was not arrested or bail taken, its property was not attached or arrested; no question was referred to a Commissioner or Commissioners, Master or Referee.

In United States District Court
Southern District of New York

C 1043-755

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,
AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,
PETITIONER,

V.

MANUFACTURERS TRUST COMPANY,
RESPONDENT.

Order to Show Cause

Upon the annexed petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, sworn to on the 29th day of October, 1947, and the exhibits annexed thereto, and good cause appearing therefor, it is

ORDERED that the Respondent herein, Manufacturers Trust Company, show cause at a motion term of this Court to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City of New York, at 10:30 A. M. on the 7th day of November, 1947, or as soon thereafter as counsel may be heard, why an order should not be made and entered herein ordering and directing the respondent to comply with Vesting Order No. 5791 of the Alien Property Custodian, and the demands based thereon, and for such other and further relief as the Court may deem just, together with the costs and disbursements of this proceeding.

Service of a copy of this order upon the respondent, or an officer or an agent thereof, together with copies of the papers upon which it is based, on or before November 3rd, 1947, shall be deemed sufficient.

Dated: New York, N. Y., October 29, 1947.

EDWARD A. CONGER,
U. S. D. J.

4

In United States District Court

Petition

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, prays for an order to show cause

against the above-named respondent and for an order for the relief hereinafter requested, on the following grounds:

1. Jurisdiction is invoked under the provisions of Section 17 of the Trading with the Enemy Act, as amended (40 Stat. 425, 50 U. S. C. App. Sec. 17).

2. On information and belief, the respondent, Manufacturers Trust Company, is and has been at all times material hereto a corporation organized and existing under the laws of the State of New York and having its principal place of business in the City of New York, within this District.

3. The respondent reported to the Government, on October 31, 1941, that it had a balance of \$39,339 in the account of the Reichsbank Direktorium, Berlin, Germany, as of June 14, 1941 (Exhibit A).

4. By Vesting Order No. 5791, issued February 1, 1946 (11 F. R. 3005), the Alien Property Custodian vested a certain debt or obligation owing to the Reichsbank Direktorium by the respondent (Exhibit B).

5. The respondent acknowledged service of the Vesting Order on April 8, 1946, and advised the Alien Property Custodian that a balance, in the sum of \$25,581.49, stood to the credit of the Deutsche Reichsbank account as of that date (Exhibit C).

6. By Executive Order No. 9788 (11 R. R. 11981), on October 15, 1946, all authority, rights, privileges, powers, duties and functions vested in the Office of Alien Property Custodian and in the Alien Property Custodian were vested, transferred and delegated to the Attorney General, and all property or interests vested in or transferred to the Alien Property Custodian or seized by him were transferred to the Attorney General.

7. The petitioner issued a turn-over directive to the respondent on January 24, 1947, requiring it to turn over to him the sum of \$25,581.49, due and owing to the Deutsche Reichsbank by the respondent, together with all accumulations and increments (Exhibit D).

8. The respondent acknowledged service of the turn-over directive on January 30, 1947 (Exhibit E).

9. The respondent, Manufacturers Trust Company, has refused and still refuses to comply with said Vesting Order No. 5791 (Exhibit B) and the turn-over directive (Exhibit D) requiring the respondent to deliver to the petitioner the sum of \$25,581.49 (Exhibit F), and the demand made as heretofore set forth that the respondent de-

liver to the petitioner as successor to the Alien Property Custodian the sum of \$25,581.49, together with all accumulations and increments thereto since February 1, 1946.

10. No previous application has been made for the relief herein requested.

WHEREFORE, the petitioner prays that an order issue requiring the respondent, Manufacturers Trust Company, to show cause why it should not be directed to comply forthwith with the aforesaid Vesting Order No. 5791, and the demands made pursuant thereto, and that an order issue ordering and directing the said Manufacturers Trust Company to comply forthwith with the aforesaid Vesting Order No. 5791 and the demands made pursuant thereto, and that petitioner receive the costs and disbursements of this proceeding.

Dated: New York, N. Y., October 29th, 1947.

JOHN F. X. McGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Petitioner,

By: LAURENCE H. AXMAN,
LAURENCE H. AXMAN,
Assistant United States Attorney,
Office & Post Office Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

(Verified October 20, 1947.)

7 *Exhibit "A", Annexed to Petition*

REPORT FROM TFR—300 SERIES E: To be Used by Banks, Only to Report Deposit Accounts, Collection Items, Cashier's and Certified Checks, Bank Acceptances, and Letters of Credit (Instruction 2).

BEFORE PREPARING THIS REPORT READ CAREFULLY THE INSTRUCTIONS IN SECTIONS I, II, III, AND VIII OF PUBLIC CIRCULAR No. 4

Nationality.—The person concerning whose property report is being made is a national of the following country or countries (Instruction 4): Germany

Number F D 1457
Instruction 15 (a)

TO THE SECRETARY OF THE TREASURY:

The undersigned, pursuant to the Regulations of April 10, 1940, as amended, issued under Executive Order No. 8389, as amended, hereby makes the following report:

PART A: NAME OF THE NATIONAL WHOSE PROPERTY IS REPORTED.

Name Reichsbank Direktorium

Last known address (Standstill Account #1) Berlin
Germany

(Business, profession, or occupation) Bank (Citizen of or organized under the laws of) Germany

8 PART C, SCHEDULE I: PROPERTY TYPES. (Instruction 6).

Type Number	Property type	Amount in U. S. dollars of property held on opening of business on	
		June 14, 1941 (a)	June 1, 1940 (b)
1.	Demand deposits (3)	\$39,339.—	\$387,812.—
2.	Time or savings deposits (4)	0	0
3.	Collection items (not reported under deposits)	250.—	0
TOTAL OF TYPES 1 TO 3		\$39,589.—	\$387,812.—
4.	Cashier's and certified checks issued or certified by report- ing bank (12)	0	Not
5.	Acceptances by reporting bank (12)	0	Readily
6.	Letters of credit (12)	0	Available
TOTAL OF TYPES 1 TO 6		\$29,589.—	\$387,812.—

**PART C, SCHEDULE II: PROPERTY ITEMS, (1) Demand De-
posits (Instruction 7).**

Name of Account	Balance as of	
	June 14, 1941	June 1, 1940
1. Vostro: Standstill A/C. #1	0—	\$387,812.—
2. Vostro: Devisen Abt.	\$39,339.—	0
TOTAL	\$39,339.—	\$387,812.—

**9 PART C, SCHEDULE II: PROPERTY ITEMS, (3) Col-
lection Items (Instruction 9).**

Description of Item (Instruction 9)	Date When Payable	Amount Payable	
		June 14, 1941	June 1, 1940
1. Check Elsie B. Kilvert on Manufacturers Trust Co.	Sight	\$250.—	Not
TOTAL		\$250.—	Readily Available

PART D: ADDITIONAL INFORMATION CONCERNING PROPERTY ITEMS. (Instruction 13.)

1. State the name, nationality, and address of any person, other than the national, having any interest in any property listed above of any nature whatsoever, direct or indirect, including any arising under powers of attorney and any other powers or rights to deal with the property or arising under any agreement restricting the national's use of the property, and describe the nature and amount of such interest.

Dep. in Obeysance Amer. Chem. Paint	\$20,000.—
" " " Dime Savings Bank	12,000.—
" " " Chemical Bank & Trust Co.	12,000.—

2. Describe any adverse or other claims, including any legal actions or proceedings whatsoever, asserted or existing against or with respect to any property listed above, stating the names, addresses, and nationalities of the adverse or other claimants and all relevant facts regarding the nature and origin of the claim, including the exact titles of legal actions or proceedings, and the courts where they were brought. none

10 3. State the name, address, and nationality of any guarantor of any deposit account listed above, and give the terms of the guarantee. none.

4. State any other facts known to the bank reporting bearing on the nature or ownership of any property listed above. none

PART E: ADDITIONAL INFORMATION CONCERNING NATIONAL (Instruction 14.)

1. State the national's citizenship and address on January 1, 1939, and on June 1, 1940, if different, respectively, from the citizenship or address in Part A. unknown

2. If the person concerning whose property this report is being made is a national of a foreign country by reason of any fact other than that such person has been a subject or citizen of a foreign country, state the facts determining his nationality as defined in Section 5E of Executive Order No. 8389, as amended. unknown

3. State whether or not you maintained a credit file on the national. yes

4. State the total indebtedness of the national to you, (a) on June 1, 1940 none (b) on June 14, 1941. none

5. State the name, number, if any, and amount of any debit account of the national, existing on either or both June 1, 1940, and June 14, 1941, indicate the date, and

state the name, address, and nationality of any guarantor of any such account, giving a brief summary of the terms of the guarantee. 5/31/40 Overdraft-Vostro \$15.—

THIS REPORT IS COVERED BY THE GENERAL AFFIDAVIT

11 *Exhibit "B", Annexed to Petition*

UNITED STATES OF AMERICA
OFFICE OF ALIEN PROPERTY CUSTODIAN
VESTING ORDER NUMBER 5791

Re: Bank account owned by Deutsche Reichsbank

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

1. That Deutsche Reichsbank, the last known address of which is Berlin, C 111, Germany, is a national of a designated enemy country (Germany);
2. That the property described as follows:

That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same, is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country;

And determining that to the extent that such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany):

- 12 And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

HEREBY VESTS in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pend-

ing further determination of the Alien Property Custodian. This Order shall not be deemed to constitute an admission by the Alien Property Custodian of the lawfulness of, or acquiescence in, or licensing of, any set-offs, charges or deductions, nor shall it be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this Order may, within one year from the date hereof, or within such further time as may be allowed, file with the Alien Property Custodian on Form APC-1 a notice of claim, together with a request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on February 1, 1946.

(Signed) JAMES E. MARKHAM
James E. Markham
Alien Property Custodian

(Official Seal)

I hereby certify that the within is a true and correct copy of the original paper on file in this office.

For the Attorney General
DONALD C. COOK, Director
Office of Alien Property
Department of Justice.

By LOYOLA M. BLANTON
Acting Assistant Secretary for Records

Exhibit "C", Annexed to Petition

MANUFACTURERS TRUST COMPANY
Fifty-Five Broad Street
New York 15, N. Y.

April 8, 1946

F-28-1282 F-8

Re: Deutsche Reichsbank

Alien Property Custodian
Washington, D. C.

Dear Sir:

We acknowledge receipt of your letter dated March 19, 1946 and Vesting Order number 5791 therein enclosed.

In and by the terms of said order, the Alien Property Custodian purports to vest in himself that certain bank account with the Manufacturers Trust Company which is due and owing to the Deutsche Reichsbank in the sum of \$25,581.49.

As we previously advised your representative, a balance in the sum of \$25,581.49 stood to the credit of the Deutsche Reichsbank account with us as of the date of the Vesting Order but on said date, and for some time prior thereto, the Deutsche Reichsbank was indebted to this institution in a sum far in excess of said balance on an obligation in a sum far in excess of said balance on an obligation which has long been past due.

In view of the foregoing, there is no credit balance available to the Deutsche Reichsbank.

Yours very truly,

BERTRAM E. DRISCOLL
Bertram E. Driscoll
Assistant Secretary

Exhibit "D", Annexed to Petition

OFFICE OF ALIEN PROPERTY
DEPARTMENT OF JUSTICE
Washington, D. C.

TURNOVER DIRECTIVE

Re: Property of Deutsche Reichsbank
Vesting Order 5791 (11 Fed. Reg. 3005,
March 21, 1946)

To: Manufacturers Trust Company,
55 Broad Street, New York 15, New York

Under the authority of the Trading with the Enemy Act, as amended; and Executive Order 9193, as amended.

15 and pursuant to law, the following described property was vested in the Alien Property Custodian by Vesting Order 5791, dated February 1, 1946 (a copy of which is attached hereto and by reference made a part hereof):

"That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same:"

and the aforesaid property was transferred to the Attorney General of the United States by Executive Order 9788.

NOW, THEREFORE, by virtue of the authority above set forth,

IT IS HEREBY FOUND AND DETERMINED that:

1. At the time of issuance of said vesting order there was due and owing by you to the said Deutsche Reichsbank a debt or obligation in the sum of \$25,581.49 arising out of the aforementioned dollar account.

2. There are no valid offsets or counterclaims to said sum of \$25,581.49.

3. The sum of \$25,581.49 is property which is now in your possession or under your control that was vested in the Alien Property Custodian by Vesting Order 5791 and transferred to the Attorney General of the United States by Executive Order 9788; and

16 IT IS HEREBY REQUIRED that the property described above, together with all accumulations to and increments thereon, shall forthwith be turned over to the undersigned to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Your attention is invited to Section 5(b)(2) of the Trading with the Enemy Act, as amended, which provides that "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in

respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

Executed at Washington, D. C. on January 24th, 1947.

For the Attorney General

DONALD C. COOK, Director
Office of Alien Property

17 *Exhibit "E", Annexed to Petition*

RETURN OF SERVICE ON TURNOVER DIRECTIVE

I, FRANCIS A. MACFARLANE an authorized representative of the Office of Alien Property, do hereby certify that on this January 30th, 1947, I served personally on Albert E. Christie, Assistant Secretary of the Manufacturers Trust Company, 55 Broad Street, New York, N. Y., a Turnover Directive, (with certified copy of Vesting Order No. 5791 attached hereto) executed January 24, 1947 for the Attorney General of the United States by Donald C. Cook, Director, Office of Alien Property, directing the turnover of the sum of \$25,581.49, together with all accumulations and increments thereon, owing to Deutsche Reichsbank by Manufacturers Trust Co., 55 Broad Street, New York, N. Y., arising out of a dollar account entitled Reichsbank Direktorium Divisen Abteilung, vested in the Alien Property Custodian by Vesting Order No. 5791. A true and correct copy of the aforesaid Turnover Directive is hereto attached and made part hereof.

FRANCIS A. MACFARLANE

RECEIPT

I, ALBERT E. CHRISTIE, Assistant Secretary of the Manufacturers Trust Co., 55 Broad Street, New York, N. Y., do hereby acknowledge receipt of the above-described Turnover Directive with certified copy of Vesting Order No. 5791 attached thereto.

A. E. CHRISTIE
1/30/47

18

Exhibit "F," Annexed to Petition

MANUFACTURERS TRUST COMPANY
Fifty-Five Broad Street
New York 15, N. Y.

February 6, 1947

Mr. Donald C. Cooke, Director
Office of Alien Property,
Washington, D. C.

Re: Bank Account owned by Deutsche Reichsbank,
Vesting Order No. 5791

Dear Mr. Cooke:

On January 30, 1947 there was served upon the Manufacturers Trust Company a Turnover Directive in connection with the above captioned account and vesting order.

We wish to advise that these documents have been referred to our counsel; Newman & Bisco, 29 Broadway, New York City, who will communicate with you in the near future.

Yours very truly,

BERTRAM E. DRISCOLL

BERTRAM E. DRISCOLL

Asst. Secretary

19

In the United States District Court

Answer to Petition

Manufacturers Trust Company, answering the petition of Tom C. Clark, Attorney General, dated October 29, 1947, respectfully shows and alleges:

1. That at all times hereinafter mentioned Manufacturers Trust Company was, and still is, a corporation organized and existing under the banking laws of the State of New York.

2. That Deutsche Reichsbank was a depositor of Manufacturers Trust Company and maintained several accounts with it.

3. That Manufacturers Trust Company was served with Vesting Order No. 5791, dated February 1, 1946, a photostatic copy of which, marked "Exhibit B", is annexed to the petition, wherein and whereby the Alien Property Custodian purported to vest "That certain debt or other obligation owing to Deutsche Reichsbank, by Manufacturers Trust Company, 55 Broad Street, New York, New York, arising out of a dollar account, entitled Reichsbank Direktorium Devisen Abteilung, and any and all rights to demand, enforce and collect the same."

4. Thereafter, on January 24, 1947, the Attorney General, as successor to the Alien Property Custodian, issued a turnover directive which contained a determination that at the time of the issuance of the Vesting Order No. 5791, there was due and owing from Manufacturers Trust Company to Deutsche Reichsbank the sum of \$25,581.49, and that there are no offsets or counterclaims thereto, and directed Manufacturers Trust Company to turn said sum over to the Attorney General.

20 5. The Attorney General is now applying to this Court under Section 17 of the Trading With The Enemy Act for an order directing Manufacturers Trust Company to pay to him the sum of \$25,581.49 upon the ground that by Vesting Order No. 5791, the Alien Property Custodian vested the said balance as a debt due from Manufacturers Trust Company to Deutsche Reichsbank.

6. Manufacturers Trust Company denies that by issuing Vesting Order No. 5791, the Alien Property Custodian vested \$25,581.49 as a debt owing from Manufacturers Trust Company to Deutsche Reichsbank for the following reasons:

Vesting Order No. 5791 does not specify that Manufacturers Trust Company is indebted to Deutsche Reichsbank in the sum of \$25,581.49 and does not contain any determination to that effect. The Attorney General is now asking for an order upon the ground that by the issuance of Vesting Order No. 5791, the Alien Property Custodian vested the \$25,581.49 as a sum due and owing from Manufacturers Trust Company to Deutsche Reichsbank. Section 7c of the Trading With The Enemy Act provides that the President may require that any property owing or belonging to or held for, by or on account of an enemy, which the President after investigation, shall determine is so legally belonging, may be seized by the Alien Property Custodian. Since such seizure is accomplished by the issuance of a Vesting Order, it is essential that the determination which is the basis for the Vesting Order be made and the property vested be specifically described in the Vesting Order itself.

7. Furthermore, by a vesting order the Alien Property Custodian can only vest property or a debt which was in existence at the time of the issuance of the Vest-
 21 ing Order. Manufacturers Trust Company did not hold any property for or on behalf of the Deutsche Reichsbank. The relationship between Manufacturers Trust Company as a depository and the Deutsche Reichsbank as a depositor of Manufacturers Trust Company is a

debtor and creditor relationship. The existence of a debt from Manufacturers Trust Company to the Deutsche Reichsbank can not be predicated upon the status of a particular account. Manufacturers Trust Company can not be a debtor of the Deutsche Reichsbank unless the total of their mutual credits exceeds the total of their mutual debits. At the time of the issuance of the Vesting Order No. 5791, Deutsche Reichsbank's indebtedness to Manufacturers Trust Company was in excess of \$25,581.49 and therefore there was no debt owing from Manufacturers Trust Company to Deutsche Reichsbank arising out of the Reichsbank Direktorium Divisen Abrechnung account. The indebtedness of the Deutsche Reichsbank arose from the fact that Deutsche Reichsbank was upon information and belief, an instrumentality and part of the German Government. The German Government guaranteed to Manufacturers Trust Company the payment of debts of various German Banks to Manufacturers Trust Company. On June 1st, 1940 and June 14th, 1941, the indebtedness of the said banks to Manufacturers Trust Company, was in excess of \$25,581.49.

8. In addition to the foregoing, Manufacturers Trust Company is advised by counsel that a lien of a bank on a depositor's balance for the amount of depositor's indebtedness to the bank is well recognized by law. Manufacturers Trust Company is further advised by counsel that Section 8 of the Trading with the Enemy Act recognizes the lien of any person who is not an enemy or an ally of an enemy and the lienor's right to realize thereon in satisfaction of the lienor's claims.

22 WHEREFORE, MANUFACTURERS TRUST COMPANY respectfully prays that the petition of Tom C. Clark, Attorney General, for an order directing Manufacturers Trust Company to pay him the sum of \$25,581.49, be denied.

Dated: New York, N. Y., November 12, 1947.

MANUFACTURERS TRUST COMPANY,

By HAROLD H. KAUFMAN,

NEWMAN & BISCO,

By SYDNEY R. NEWMAN,

A member of the firm,

Attorneys for Respondent.

Office and P. O. Address,

29 Broadway,

Borough of Manhattan,

City of New York.

(Verified November 13, 1947.)

23

In United States District Court

Order Appealed From

This proceeding coming on to be heard upon the petition of Tom C. Clark, Attorney General of the United States, as successor to the Alien Property Custodian of the United States, and the exhibits annexed thereto, and an order to show cause dated October 30, 1947 and upon the service duly made upon the respondent, Manufacturers Trust Company, pursuant to the said order to show cause; upon the entry of appearance by Newman & Bisco, Esqs., for the respondent; upon the answer of Newman & Bisco, attorneys for the respondent, and the court having heard Michael L. Looney, Chief Trial Attorney, Department of Justice, of counsel for the petitioner, in support of the petition, and Henry Landau, of Newman & Bisco, attorneys for respondent in opposition thereto and the matter having been duly considered,

NOW THEREFORE, upon the petition and exhibits annexed thereto and the order to show cause and entry of appearance on behalf of respondent, Manufacturers Trust Company, upon the answer filed in behalf of said respondent and upon all of the proceedings heretofore had herein, it is

ORDERED, that the said Manufacturers Trust Company be and hereby is directed to pay over to Tom C. Clark, Attorney General of the United States as successor to the Alien Property Custodian, the sum of \$25,581.49, plus interest at the rate of 6% per annum from January 30, 1947, amounting to \$1354.63 plus costs as taxed in the sum of \$27.12 amounting in all to \$26,963.29.

Dated: New York, N. Y., December 12th, 1947.

ALFRED C. COXE,
U. S. D. J.

24

In United States District Court

(Title Omitted)

Notice of Appeal

NOTICE IS HEREBY GIVEN that Manufacturers Trust Company, respondent above named, hereby appeals to the Circuit Court of Appeals of the Second Circuit from the order directing Manufacturers Trust Company to pay to Tom C. Clark, Attorney General of the United States, as successors to the Alien Property Custodian, the sum of

\$26,963.29 entered in this proceeding on the 12th day of December, 1947.

NEWMAN & BISCO,
By SYDNEY R. NEWMAN,
A Member of the Firm,
Attorneys for Appellant,
Office and P. O. Address,
29 Broadway,
Borough of Manhattan,
City of New York.

Dated: December 29, 1947.

25 To:

Clerk of the United States District Court,
Southern District of New York.

JOHN F. X. MCGOHEY, Esq.,
United States Attorney,
Attorney for Respondent,
U. S. Courthouse,
Foley Square,
New York, N. Y.

In United States District Court
(Title Omitted)

Appellant's designation of contents of record on appeal

Sirs:

Respondent-appellant designates the following portions of the record and proceeding to be contained in the record on appeal in this proceeding:

1. The order to show cause made by Judge Edward A. Conger on October 29, 1947 and petition of Tom C. Clark, Attorney General, dated October 9, 1947, and exhibits attached thereto.
- 26 2. Answer of Manufacturers Trust Company verified November 12, 1947.
3. The order of Judge Alfred C. Coxé dated December 12, 1947.
4. Notice of Appeal.
5. This designation.

Dated: New York, December 29, 1947.

Yours, etc.,

NEWMAN & BISCO,
Attorneys for Respondent-Appellant.
Office and P. O. Address,
29 Broadway,
Borough of Manhattan,
City of New York.

To:

JOHN F. X. MCGOHEY, Esq.,
United States Attorney,
Attorney for Petitioner-Respondent,
 U. S. Courthouse,
 Foley Square,
 New York, N. Y.

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In United States District Court
 (Title Omitted)

Stipulation as to record

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated: New York, January 27th, 1948.

NEWMAN & BISCO,
Attorneys for Respondent-Appellant.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Petitioner-Appellee.

28 Clerk's Certificate to foregoing transcript omitted in printing.

29 In United States Circuit Court of Appeals
 for the Second Circuit

No. 216—October Term, 1947

(Argued April 14, 1948. Decided August 5, 1948)

Docket No. 20924

TOM C. CLARK, Attorney General of the United States,
 as successor to the Alien Property Custodian,
 PETITIONER-APPELLEE,

v.

MANUFACTURERS TRUST COMPANY,
 RESPONDENT-APPELLANT.

Before SWAN, CLARK and FRANK, Circuit Judges
 Appeal from the District Court of the United States
 for the Southern District of New York

Petition by the Attorney General of the United States,
 as successor to the Alien Property Custodian, brought

under § 17 of the Trading with the Enemy Act, 50 U.S.C.A. App. § 17, against Manufacturers Trust Company. From an order directing the respondent to pay to the petitioner the sum of \$25,581.49 with interest thereon at 6% per annum from January 30, 1947, plus costs, amounting in all to \$26,963.29, the respondent appeals. Order modified.

NEWMAN & BISCO, Attorneys for appellant; LEONARD G. BISCO and HENRY LANDAU, of counsel.

DAVID L. BAZELON, Assistant Attorney General, JOHN F. X. McGOHEY, United States Attorney for the Southern District of New York, MAX ISENBERGH, Special Assistant to the Attorney General, and JOSEPH W. BISHOP, JR., Attorney, Department of Justice, for appellee.

Opinion

SWAN, Circuit Judge:

This is an appeal by Manufacturers Trust Company, for brevity hereafter called the Bank, from an order entered in a proceeding brought under § 17 of the Trading with the Enemy Act, 50 U.S.C.A. App. § 17, to compel payment to the Attorney General of a debt of \$25,581.49 alleged to be owed by the Bank to Deutsche Reichsbank, a German national. The proceeding was commenced in October 1947 by an order to show cause and a petition which alleged the existence of the debt, the issuance by the Alien Property

Custodian of a vesting order and a turn-over directive, and the Bank's refusal to comply therewith.¹

The Bank's answer denied the existence of the alleged debt because the Deutsche Reichsbank was indebted to the Bank in a sum in excess of \$25,581.49. The answer also asserted that the Bank's right to apply the depositor's balance against the depositor's indebtedness amounted to a possessory lien within section 8 of the Act, 50 U.S.C.A. App. § 8. Upon the pleadings and the exhibits attached thereto, the court entered the order before us on appeal. It directs the Bank to pay the Custodian the sum of \$25,581.49 with interest thereon at 6% per annum from January 30, 1947, plus costs. No opinion was written by the district judge.

¹ By Executive Order No. 9788 of October 14, 1946, 11 F. R. 11981, the Attorney General succeeded to the rights, powers and duties of the Alien Property Custodian. In this opinion the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor without discriminating between them.

From the pleadings and attached exhibits the following facts appear: In October 1941 the Bank reported to the Secretary of the Treasury that as of June 14, 1941 a demand deposit of some \$39,000 stood to the credit of Reichsbank Direktorium, of Berlin, Germany, and that the Reichsbank was not indebted to it. On February 1, 1946, the Custodian issued Vesting Order No. 5791 which described the property thereby vested as "That certain debt or other obligation owing to Deutsche Reichsbank by Manufacturers Trust Company, 55 Broad Street, New York, N. Y., arising out of a dollar account entitled Reichsbank Direktorium Divisen Abteilung, and any and all rights to demand, enforce and collect the same." Vesting Order No. 5791 found that Deutsche Reichsbank was a German national but made no determination as to the amount of the debt owing to it. By letter dated April 8, 1946 the Bank acknowledged receipt of the Vesting Order, admitted that a balance of \$25,581.49 (stood to the credit of the Deutsche Reichsbank account with us as of the date of the Vesting Order" but asserted that no credit balance is available because on that date the Deutsche Reichsbank was indebted to it in a sum far in excess of said balance on an obligation which had long been past due. The nature of that obligation is set forth in the Bank's answer which alleges that the indebtedness of the Deutsche Reichsbank arose from the fact that it was, "upon information and belief," an instrumentality and part of the German Government; that the German Government guaranteed to the Bank the payment of debts of various German banks and that their indebtedness to the Bank on June 14, 1941 was in excess of \$25,581.49. By a Turnover Directive which was served on the Bank on January 30, 1947, the Custodian determined that at the time of the issuance of Vesting Order 5791 the Bank owed Deutsche Reichsbank \$25,581.49; that "there are no valid offsets or counter-claims to said sum," that said sum is property which

31 "is now" in the Bank's possession or control that was vested in the Custodian; and the Custodian made demand that such property be forthwith turned over to him. After the Bank refused to comply, the present proceeding was instituted on October 29, 1947.

This appeal presents several interesting questions upon which there is surprisingly little direct authority. A suit under § 17 of the Act is a summary proceeding to compel delivery of possession of enemy-owned property which has

been effectively seized by a valid vesting order. The appellant concedes, as it must, that a debtor must pay to the Custodian an acknowledged debt regardless of any controversy as to who is the creditor. *American Exchange National Bank v. Gervan*, 273 F. 43 (C.C.A. 2), aff'd sub nom. *Simon v. American Exchange National Bank*, 260 U. S. 706. This imposes no hardship since the debtor is protected by § 7(e) from pursuit by any other person. But when the existence of the debt is denied, the appellant contends that requiring it to be paid before judicial determination of the dispute, in effect permits the Custodian to *create* the debt by his ex parte determination and to seize property of the putative debtor which is not owed to the enemy or to anyone else. The consequences of giving the Custodian such a power are exceedingly drastic; the alleged debtor may have to sell property in order to obtain the money necessary to make the payment, and the loss so sustained is not remediable by a suit under § 9 for its return.

Section 7(e) provides that "If the President shall so require any money . . . owing . . . to . . . an enemy . . . which the President after investigation shall determine is so owing . . . shall be . . . paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; . . ." Despite the brevity of this language Judge Learned Hand was of opinion . . . "must be confined to debts whose validity and extent the debtor acknowledges," and supported his view with cogent reasons. *Simon v. Miller*, 298 F. 520 (S.D.N.Y.). In opposition to this interpretation, the Custodian relies on *Camp v. Miller*, 286 F. 525 (C.C.A. 5) and *Clark v. E. J. Lavino & Co.*, 72 F. Supp. 497 (E.D. Pa.). In the *Camp* case the maker of a \$15,000 note resisted the Custodian's demand for payment upon the ground that the enemy-owner of the note had agreed that it was to be paid off in German marks, and therefore a lesser sum was due than the Custodian claimed. But the court held that the sum demanded must be paid and the debtor must seek relief under § 9 of the Act. In the *Lavino* case, the debtor admitted that \$25,000 was owed to an enemy but claimed the right to set off an unliquidated claim for loss of cargo. The court held that in a suit under § 17, the set-off could not be asserted, and relegated Lavino to a suit under § 9. The result, the appellant concedes, was right because the

32 debts were not "mutual," as required in set-off, but the court's reasoning is disagreed with by the appellant, as is also the decision in *Camp v. Miller, supra*.

If the putative debtor denies the existence of any debt whatever, we should hesitate to hold that the Custodian's power extends so far as to make his ex parte determination that there is a debt and the amount of it conclusive in a proceeding under § 17. To so hold would mean that the Custodian can by his own ex parte action call property into existence for purposes of seizure. But the question in that bald form is not before us for decision. Here the Bank acknowledges that it became indebted to the Deutsche Reichsbank in the sum of \$25,581.49, but asserts a right of set-off arising out of independent transactions between itself and the German Government. Its right of set-off, if any, depends upon an allegation upon "information and belief" that the Reichsbank "was an instrumentality and part of the German Government." Thus the issue tendered is not as to the existence of the debt demanded by the Custodian, but whether an independent claim may be used as a set-off. It is argued that by New York law applicable to the settlement of mutual accounts, between a bank and its depositor, the bank's obligation is reduced to the extent of the set-off so that only the remaining balance is the actual debt owing. It is true that there are cases containing language to this effect. Thus, in *Long Beach Trust Co. v. Warsaw*, 264 N. Y. 331, 334, the opinion states: "It is only the balance which is the real or just sum owing by or to the insolvent."² This language is appropriate to the cases where it was used but would seem to have little bearing on the question now before us. At common law a defendant was not allowed to set up any cross claim against a plaintiff by way of set-off or counterclaim. A restricted right of set-off was developed in equity and finally by statute set-off was allowed in all cases. Technically, a set-off at law is a money demand independent of and unconnected with the plaintiff's cause of action. *Otto v. Lincoln Savings Bank*, 268 App. Div. 400, 402, aff'd 294 N. Y. 798. Hence the assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim for the amount of its deposit. Consequently, we believe that, in harmony with the principle that an admitted debt owed to an enemy must be paid over,

² See also *Gerseta Corp. v. Equitable Trust Co.*, 241 N. Y. 418, 424; *Kress v. Central Trust Co.*, 246 App. Div. 76, 79, aff'd, 272 N. Y. 629.

the Custodian was entitled to recovery and the Bank must have recourse to § 9 to litigate its asserted right of set-off.³

33 The appellant further contends that under section 8 of the Act⁴ it has a possessory lien on the credit balance of its depositor, the Reichsbank, which it is entitled to retain against the Custodian. The Custodian argues that section 8(a) was designed not to protect lienors from the temporary dispossession to which all holders of enemy owned property are subject, but to ensure that an American holder of a possessory lien might, in a suit under § 9, recover not merely the value of his equity in the property, but actual possession of the whole of the property.⁵ But the correctness of the Custodian's argument in this respect need not be decided. In our opinion the Bank's right of set-off is not a "lien or other right in the nature of security in property of an enemy," within the meaning of the statutory language. Although sometimes referred to as a "banker's lien," the right of set-off is not technically a lien,⁶ and certainly not a lien in property of an enemy, for the deposit of money in a bank passes title to the money and creates the ordinary debtor-creditor relationship. A credi-

³ We do not think this conclusion is necessarily inconsistent with *Simon v. Miller*, 298 F. 520 (S. D. N. Y.). From the statement of facts it appears that Simon "had had financial dealings with a German subject, one Albert, which had not then, and never have, been stated between them." It is possible that the transactions were so related that neither party would become indebted to the other without an accounting. If so, the situation there considered by Judge Learned Hand did not involve a set-off of claims arising from independent transaction, as in the case at bar.

⁴ See 8(a): "Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law * * * *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; * * * *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

⁵ See H. Rep. No. 85, 65th Cong. 1st Sess. p. 3; S. Rep. No. 113, 65th Cong. 1st Sess. p. 8.

⁶ See 38 Harv. L. Rev. 800.

tor has no possessory lien on the general assets of his debtor. The reference in § 8 to "property . . . which, by law or by the terms of the instrument . . . may be disposed of on notice or presentation or demand," makes it quite plain, we think, that the security interests protected are those in specific property which may have been hypothecated by pledge, mortgage, etc., or otherwise subjected to a possessory lien, but does not cover property constituting the general assets of a debtor against which the enemy asserts only a claim as a creditor.

34 The appellant's final contention is that the court erred in allowing interest from January 30, 1947, the date of service of the turn-over directive. The Trading with the Enemy Act contains no provision for the payment of interest or any other penalty in the event of non-compliance with the Custodian's demand that enemy-owned property be turned over to him. The summary procedure provided by § 17 enables the Custodian, without delay if he immediately invokes it, to obtain an order directing compliance. Such an order directing payment of the sum demanded will doubtless bear interest under the general statutes dealing with interest on judgments. But we see no reason to suppose that Congress intended the Custodian to get interest during the period elapsing between his demand for payment and the entry of judgment. No authority allowing it has been called to our attention. The cases relied upon by the appellee involve taxes or advances where the right to the money was finally adjudicated. Here the only right adjudicated is the right to hold possession; if the Bank shall succeed in a § 9 suit in establishing its claim of set-off the Custodian will have to return what he collects. A majority of the court believes there was an error in allowing interest amounting to \$1354.68. Judge Clark, however, believes that, since the defendant took upon itself the decision to detain the money without legal right, and had the use thereof during the period of detention, the usual rule of interest on illegally withheld payments should apply.

The order is modified by striking out this interest item and in other respects is affirmed. No appellate costs are awarded.

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I think we should hold no more than this: Assuming, arguendo, that an unequivocal claim by appellant of mutual debts would have called for reversal, we affirm because appellant's answer made no such claim; it merely alleged "upon information and belief" (1) that the Reichsbank was an instrumentality and part of the German government, and (2) that that government owed appellant an amount in excess of the amount of the Reichsbank's deposit; as against the custodian such an allegation is insufficient in an action like this.

Opinion

CLARK, Circuit Judge, dissents as to the modification for denial of interest and concurs as to the remainder of the opinion.

35 In United States Circuit Court of Appeals,
Second Circuit

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark,
Hon. Jerome N. Frank, Circuit Judges.

TOM C. CLARK, Attorney General, Etc.,
PETITIONER-APPELLEE.

5.

**MANUFACTURERS TRUST CO.,
RESPONDENT-APPELLANT.**

**Appeal from the District Court of the United States
for the Southern District of New York**

Judgment—filed Aug. 5, 1948

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified by striking out a certain interest item, but affirmed in other respects in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

36 (File endorsement omitted)

Clerk's Certificate to foregoing transcript omitted in printing.

37 [fol. 37] Supreme Court of the United States,

October Term, 1949

No. 15

MANUFACTURERS TRUST COMPANY, PETITIONER,

v.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3, 1948, providing the statutory time has not already expired.

ROBERT H. JACKSON,

Associate Justice of the Supreme Court of the United States.

Dated this 5th day of November, 1948.

(9709)

38 Supreme Court of the United States

No. 11—October Term, 1949.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

Order Allowing Certiorari—Filed June 27, 1949.

ON CONSIDERATION of the motion for leave to file a petition for rehearing and of the petition for rehearing in this case,

IT IS ORDERED by this Court that the motion for leave to file and the petition for rehearing, be, and they are hereby, granted. The order entered January 17, 1949, denying certiorari is vacated and the petition for writ of certiorari is granted.

AND IT IS FURTHER ORDERED that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 15—October Term, 1949.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit

Order Allowing Certiorari—Filed June 27, 1949.

ON CONSIDERATION of the motion for leave to file a petition for rehearing and of the petition for rehearing in this case,

IT IS ORDERED by this Court that the motion for leave to file and the petition for rehearing, be, and they are hereby, granted. The order entered January 17, 1949, denying certiorari is vacated and the petition for writ of certiorari is granted.

AND IT IS FURTHER ORDERED that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.